

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

February 22, 2000

Opinion No. 00-029

Amending a Nonprofit Corporation's Charter

QUESTIONS

1. May the charter of a nonprofit corporation include provisions pursuant to Tenn. Code Ann. § 48-52-102(b)(2) that state “this charter may be amended by majority vote at any meeting of the board of directors” and “a change in the number of directors shall be made only by amendment to the charter” such that the board of directors may amend the charter and the number of directors without submitting the charter amendment to the members in accordance with Tenn. Code Ann. § 48-60-103(a)?

2. Similarly, may the board of directors of a nonprofit corporation with a charter that provides that “this charter may be amended by majority vote at any meeting of the board of directors” vote to expand or alter the powers of the corporation as enumerated in its charter without submitting the charter amendment to its members in accordance with Tenn. Code Ann. § 48-60-103(a)?

OPINIONS

1. and 2. No, to both questions. Assuming that the nonprofit corporation has elected to have members pursuant to Tenn. Code Ann. § 48-52-102(a)(8), the board of directors may not amend the charter without submitting the charter amendment to its members in accordance with Tenn. Code Ann. § 48-60-103, unless the charter amendment is an amendment that is authorized to be adopted without member approval pursuant to Tenn. Code Ann. § 48-60-102. However, neither amending a charter provision that sets forth the number of directors nor amending a charter provision that establishes the powers of the corporation are permissible pursuant to Tenn. Code Ann. § 48-60-102.

ANALYSIS

(1)

The Tennessee Nonprofit Corporation Act, Tenn. Code Ann. § 48-51-101 *et seq.* (herein referred to as the “Act”) attempts to provide a flexible approach to nonprofit corporations. Many of the provisions in the Act include the language, “unless its charter or bylaws provide otherwise,” so that a nonprofit corporation has the flexibility to structure and to operate the corporation in the

manner that it deems best suited to further its purposes. However, some of the Act's provisions are mandatory and are not subject to modifications or variations.

Tenn. Code Ann. § 48-52-102 which addresses charter provisions is a good example of the Act's balancing of mandatory provisions and permissible provisions. Tenn. Code Ann. § 48-52-102(a) establishes what a charter "must" set forth. For instance, the charter must include a statement as to whether a corporation will or will not have members.¹ Next, in Tenn. Code Ann. § 48-52-102(b), the Act provides a flexible framework as to provisions that a charter "may" set forth. An example is Tenn. Code Ann. § 48-52-102(b)(2)(C) which allows a charter to set forth provisions not inconsistent with the law that define, limit and regulate the powers and rights of the corporation, its board of directors, and members or any class thereof, not inconsistent with law.

In formulating an opinion to the specific aforementioned questions, one must analyze the Act to determine whether the provisions of this specific charter relate to the mandatory sections of the Act, to the flexible sections of the Act, or to both. In question number one, the sample charter provision stating that "a change in the number of directors shall be made only by amendment to the charter" is not a statement that is mandatory according to Tenn. Code Ann. § 48-52-102(a). Consequently, one must determine whether this provision may be set forth in a charter. This particular charter provision would be permissible pursuant to Tenn. Code Ann. § 48-52-102(b) which, as previously stated, provides a flexible framework for provisions that "may" be set forth in the charter. Specifically, this provision is controlled by Tenn. Code Ann. § 48-52-102(b)(2)(B) which states that a charter may set forth provisions "[r]egarding the management of the business and regulating the affairs of the corporation" so long as those provisions are not inconsistent with the law. Once it is determined that this type of statement may be set forth in the charter, one must determine whether this particular statement is consistent with the law. The law regarding the number of directors in a nonprofit corporation is found in Tenn. Code Ann. § 48-58-103. This section requires a mandatory minimum number of directors, and at the same time provides a nonprofit corporation with another degree of flexibility, the procedure for altering the number of directors. Tenn. Code Ann. § 48-58-103(b) states that the "number of directors may be increased or decreased (but to no fewer than three (3)) from time to time by amendment to, or in the manner prescribed in, the charter or bylaws." The result is that a provision stating that "a change in the number of directors shall be made only by amendment to the charter" is a permissible charter provision because it may be set forth in the charter according to Tenn. Code Ann. § 48-52-102(b)(2)(B) and because it is consistent with the law as stated in Tenn. Code Ann. § 48-58-103(b) as long as the number of directors is three or more.

¹Tenn. Code Ann. § 48-52-102(a)(8). See also Tenn. Code Ann. § 48-56-103 which specifically provides that a nonprofit corporation is not required to have members.

The other sample charter provision posited in question number one states that “this charter may be amended by majority vote at any meeting of the board of directors.” This provision is not one that “must” be set forth in the charter according to Tenn. Code Ann. § 48-52-102(a). However, it is one that “may” be set forth pursuant to Tenn. Code Ann. § 48-52-102(b)(2)(C) which provides that a charter may set forth a provision “[d]efining, limiting and regulating the powers and rights of the corporation, its board of directors and members or any class thereof,” as long as the provision is not inconsistent with law. Again, once it is determined that this type of statement “may” be set forth in the charter, the next step is to determine whether this particular statement is consistent with the law. Whether this particular provision is consistent with the law depends on whether the nonprofit corporation has members. If the nonprofit corporation does not have members, the example provision stating that “this charter may be amended by majority vote at any meeting of the board of directors” may be consistent with Tenn. Code Ann. § 48-60-102(b), which deals specifically with amendments to the charter by the board of directors. However, this inquiry would be very fact specific. Several factors could be present in a nonprofit corporation’s charter that would, indirectly, make this particular provision inconsistent with the law. For example, the charter may provide that a third party must approve an amendment pursuant to Tenn. Code Ann. § 48-60-301. Thus, without examining the entire charter, it would be difficult to determine whether in a corporation without members, a provision providing that the charter may be amended by majority vote of the board of directors is absolutely consistent with the law.

If the nonprofit corporation does elect to have members, a charter provision stating that “this charter may be amended by majority vote at any meeting of the board of directors” is directly inconsistent with Tenn. Code Ann. § 48-60-103. As previously mentioned, the Act does not require that a nonprofit corporation have members.² However, if a corporation elects to have members, these members are afforded basic rights and protections by the Act. Tenn. Code Ann. § 48-60-103(a) mandates that “an amendment to a corporation’s charter to be adopted must be approved: (1) Except as provided in § 48-60-102, by the members” Therefore, a charter provision that empowers the board of directors to amend the charter unilaterally, without member approval, would be inconsistent with Tenn. Code Ann. § 48-60-103(a) and, as a result, would not be a permissible charter provision under Tenn. Code Ann. § 48-52-102(b)(2)(C). Thus, a nonprofit corporation with members may not have a charter provision that states, “this charter may be amended by a majority vote at any meeting of the board of directors.”

Regardless of the legality of the aforementioned charter provision, a related issue which arises in this particular situation is whether the board of directors may amend the charter pursuant to Tenn. Code Ann. § 48-60-102(a)(7). As discussed in paragraph three of this analysis, this charter has a permissible provision that states, “a change in the number of directors shall be made only by amendment to the charter.” Additionally, Tenn. Code Ann. § 48-60-102(a)(7) states that the board of directors may amend the charter to make “any other change expressly permitted by chapters 51-68 of this title to be made by director action without member action.” The question then becomes

²Tenn. Code Ann. § 48-56-103.

whether the Act expressly permits the board of directors to amend a charter provision that sets forth the number of directors. It is the opinion of this office that the board of directors cannot amend the number of directors pursuant to Tenn. Code Ann. § 48-60-102(a)(7). Tenn. Code Ann. § 48-58-103(a) requires that the number of directors must be “specified in or fixed in accordance with the charter or bylaws.” In this particular example, the corporation has chosen to specify the number of directors in the charter. Tenn. Code Ann. § 48-58-103(b) further provides that the number of directors may be increased or decreased “by amendment to or in the manner prescribed in, the charter or bylaws.” Again, this particular corporation has a provision that requires the number of directors to be changed only by amendment to the charter. However, neither Tenn. Code Ann. § 48-58-103(b) nor any other section of this Act expressly permits the board of directors to make a change in the number of directors by amendment to the charter without member approval. The result is that in this corporation, the board of directors cannot amend the charter to change the number of directors without member approval.

(2)

Obviously, the previous analysis and the subsequent conclusion concerning a charter provision that states, “this charter may be amended by majority vote at any meeting of the board of directors” is applicable to question two. Likewise, a nonprofit corporation with members may not have a provision that divests members of their rights under Tenn. Code Ann. § 48-60-103(a). As discussed under the analysis of question one, this provision would empower the board of directors to amend the charter without member approval. Therefore, the provision is inconsistent with Tenn. Code Ann. § 48-60-103(a) and is not allowed by Tenn. Code Ann. § 48-52-102(b)(2)(C), since the provisions authorized by that subsection must still be “not inconsistent with law.” Tenn. Code Ann. § 48-52-102(b)(2). Thus the board of directors may not rely on this provision to amend a charter provision that sets forth the powers of the corporation without member approval pursuant to Tenn. Code Ann. § 48-60-103.

Again, as in paragraph six of this analysis, a related issue is whether the board of directors of a nonprofit corporation with members may amend a charter provision that sets forth the powers of the corporation pursuant to Tenn. Code Ann. § 48-60-102(a)(7). As previously discussed, for the board of directors to amend the charter pursuant to this section (in other words without member approval), another section of the Act must expressly permit the amendment; however, there is no such section that expressly permits the board to expand or alter the powers of the corporation in this fashion. Thus, the board of directors of a corporation with members may not amend the charter provision that sets forth the powers of the corporation without member approval pursuant to Tenn. Code Ann. § 48-60-103.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

TRAJAN H. CARNEY, IV
Assistant Attorney General

Requested by:

The Honorable Ben Atchley
State Senator
303 War Memorial Building
Nashville, TN 37243-0206